

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X	
R. BERTIL PETERSON,	:
Plaintiff,	:
	:
-v-	:
	:
THE CITY OF NEW YORK, et al.,	:
Defendants.	:
-----X	

11 Civ. 3141 (DLC)

OPINION & ORDER

Appearances:

For plaintiff:
Richard Bertil Peterson, pro se
15 Oaks Hunt Road
Lake Success, NY 11020

For defendants City of New York and Kevin Watz:
Diana Marsh Murray
NYC Law Department, Office of the Corporation Counsel (NYC)
100 Church Street
New York, NY 10007

DENISE COTE, District Judge:

Pro se plaintiff R. Bertil Peterson ("Peterson") brings this action against the City of New York (the "City"), Police Officer Kevin Watz ("Officer Watz"), and one-hundred unnamed employees, independent contractors, agents, and/or assignees. Peterson brings claims for compensatory and punitive damages, attorney's fees, and costs pursuant to §§ 1962(c) and (d) of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1962, the Fourth Amendment to the U.S. Constitution, Article I § 12 of the New York State Constitution, 42 U.S.C. § 1983, 42 U.S.C. § 1988, New York Civil Practice Law and Rules § 8303-a,

and New York State law. The City and Officer Watz have filed a motion to dismiss the complaint for lack of subject matter jurisdiction and for failure to state a claim. For the following reasons, the motion to dismiss is granted with respect to all of plaintiff's federal claims with the exception of his Fourth Amendment claim of unreasonable seizure. Certain state law claims and the unreasonable seizure claim are stayed.

BACKGROUND

The following facts are taken from the plaintiff's complaint unless otherwise noted, and are taken to be true for purposes of this motion. LaFaro v. New York Cardiothoracic Group, PLLC, 570 F.3d 471, 475 (2d Cir. 2009). On March 6, 2010, Peterson was pulled over for a traffic stop by Officer Watz, and was issued a traffic summons for driving while using a cell phone. Peterson claims that he was not, in fact, using his cell phone prior to being pulled over.

On May 14, 2010, a hearing on the traffic violation was held before Department of Motor Vehicles ("DMV") Administrative Law Judge William Lee ("ALJ Lee"). ALJ Lee convicted Peterson of improper cell phone use in violation of New York State Vehicle & Traffic Law, Article 33, § 1225-c. Peterson was fined 130 dollars, including a 30 dollar surcharge. Peterson maintains that he produced evidence at this hearing, such as his

cell phone records, that demonstrates his innocence. He also claims that he successfully impeached the testimony of Officer Watz during cross-examination.

On October 12, 2010, the State of New York DMV Appeals Board sustained the determination of ALJ Lee. On November 1, 2010, Peterson filed a petition in the New York State Supreme Court pursuant to Article 78 of the CPLR seeking to annul, vacate, and set aside the determination of the DMV Appeals Board. On January 12, 2011, the petition was transferred to the Appellate Division, Second Judicial Department. The defendants have asserted that this proceeding (the "Article 78 Proceeding") is currently pending before the Appellate Division, and Peterson has not countered this assertion.

Peterson filed his complaint in this Court on May 10, 2011. The complaint asserts the following nine causes of action against all defendants:

1. A substantive RICO violation pursuant to 18 U.S.C. 1962(c);
2. A RICO conspiracy pursuant to 18 U.S.C. 1962(d);
3. An illegal search and seizure in violation of the Fourth Amendment of the Constitution and Article I § 12 of the New York State Constitution;
4. Malicious prosecution pursuant to § 1983 and the Fourth Amendment;

5. Malicious abuse of process under § 1983 and the Fourth Amendment;
6. A procedural due process violation pursuant to § 1983 and the Fourteenth Amendment;
7. A claim for costs and attorney's fees pursuant to 42 U.S.C. § 1988 and CPLR § 8303-a;
8. Malicious prosecution under New York State law; and
9. Malicious abuse of process under New York State law.

On August 15, 2011, defendants the City and Officer Watz moved to dismiss the complaint under Rules 12(b)(1) and 12(b)(6), Fed. R. Civ. P., on grounds that the Court should abstain from exercising jurisdiction over the federal claims in light of plaintiff's pending state proceeding, that plaintiff failed to state a federal claim, that the Court should decline to exercise supplemental jurisdiction over State law claims, and that the complaint failed to state a State law claim in any case. The motion to dismiss was fully submitted on October 31, 2011. For the following reasons, the federal claims in counts one, two, and four through seven, and the state law claims in counts eight and nine, are dismissed for failure to state a claim. The remaining claims are stayed until completion of the Article 78 Proceeding.

DISCUSSION

On a motion to dismiss under Rule 12(b)(6), the court must "accept all allegations in the complaint as true and draw all inferences in the non-moving party's favor." LaFaro, 570 F.3d at 475 (citation omitted). A complaint must do more, however, than offer "naked assertions devoid of further factual enhancement," and a court is not "bound to accept as true a legal conclusion couched as a factual allegation." Ashcroft v. Iqbal, 556 U.S. 662, 129 S.Ct. 1937, 1949-50 (2009). Accordingly, a court may disregard "threadbare recitals of a cause of action's elements, supported by mere conclusory statements." Id. at 1940.

Furthermore, "a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." Id. at 1949 (citation omitted). If the factual allegations "are merely consistent with a defendant's liability, [the complaint] stops short of the line between possibility and plausibility of entitlement to relief." Id. (citation omitted).

Applying this plausibility standard is "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." Id. at 1950. There must be a "reasonably founded hope that the discovery process will reveal relevant evidence." Bell Atl. Corp. v. Twombly, 550 U.S. 544,

563 n.8 (2007) (citation omitted). "Plausibility thus depends on a host of considerations: the full factual picture presented by the complaint, the particular cause of action and its elements, and the existence of alternative explanations so obvious that they render plaintiff's inferences unreasonable." L-7 Designs, Inc. v. Old Navy, LLC, 647 F.3d 419, 430 (2d Cir. 2011).

Pleadings filed by pro se plaintiffs are to be construed liberally. Chavis v. Chappius, 618 F.3d 162, 170 (2d Cir. 2010). The rule favoring liberal construction of pro se submissions is especially applicable to civil rights claims. Hemphill v. New York, 380 F.3d 680 (2d Cir. 2004).

I. The RICO Claims

The City and Officer Watz have moved to dismiss the complaint's two RICO claims. To state a viable RICO claim pursuant to 18 U.S.C. § 1962(c), a plaintiff must allege (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity. Sedima S.P.R.L. v. Imrex Co., Inc., 473 U.S. 479, 496. To state a RICO claim pursuant to 18 U.S.C. 1962(d), a plaintiff must allege a conspiracy to commit a substantive RICO violation pursuant to 18 U.S.C. § 1962(a), (b), or (c). See 18 U.S.C. § 1962(d).

An "enterprise" includes "any individual, partnership, corporation, association, or other legal entity, and any union

or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4). In his complaint, Peterson describes the RICO enterprise as consisting of an "association-in-fact" among the named and unnamed defendants. An "association-in-fact" enterprise must have at least three structural features: 1) a purpose, 2) relationships among those associated with the enterprise, and 3) longevity sufficient to permit these associates to pursue the enterprise's purpose. Boyle v. United States, 556 U.S. 938, 129 S.Ct. 2237, 2244 (2009). Accordingly, a plaintiff's "conclusory naming of a string of entities does not adequately allege an enterprise." First Capital Asset Management, Inc. v. Satinwood, Inc., 385 F.3d 159, 175 (2d Cir. 2004) (citation omitted).

Peterson does not plead sufficient facts to support a plausible claim to the existence of an association-in-fact enterprise. Peterson claims that the defendants participated in a racketeering scheme whereby 1) police officers would illegally stop and detain motorists and falsely accuse them of violating traffic laws, 2) police officers would present false testimony at hearings before DMV Administrative Law Judges ("ALJs"), 3) the DMV ALJs would validate this false testimony and find innocent motorists guilty of traffic violations, and 4) the DMV Appeals Board would affirm these convictions. In furtherance of this scheme, Peterson claims that defendants and their co-

conspirators adopted rules that made it easier to convict motorists of traffic violations, such as not providing for pre-hearing discovery or a supporting deposition, and allowing ALJs to question motorists and convict them based on "clear and convincing evidence." According to Peterson, the scheme garnered over \$76 million in traffic fines, surcharges and suspension termination fees.

In support of these claims, Peterson alleges the following facts: that he was not driving while using his cell phone, that he was nonetheless subject to a traffic stop and issued a traffic summons by Officer Watz, that he was convicted by ALJ Lee after an opportunity to present his case and cross-examine Officer Watz, that this conviction was upheld on appeal, that the DMV has adopted certain rules of procedure and evidence in its adjudicatory proceedings that differ from those in more formal proceedings, and that the collection of fines, surcharges and suspension fees from motorists results in income to the City and other municipalities. These facts do not support a plausible claim that the defendants and any co-conspirators shared a common purpose to defraud motorists, that there was a relationship among the defendants, or that the defendants worked towards this common purpose for any amount of time beyond that which was necessary to sustain Peterson's conviction. The sole connection among the entities and individuals in the alleged

enterprise is the traffic summons and its subsequent adjudication.¹ The complaint thus fails to plead those facts necessary to nudge plaintiff's claim across the line "between possibility and plausibility" with respect to all three structural features of an association-in-fact enterprise. Iqbal, 129 S.Ct. at 1949.

The existence of a RICO enterprise is a necessary element for liability under 28 U.S.C. § 1962(c). City of N.Y. v. Smokes-Spirits.com, Inc., 541 F.3d 425, 439 (2d Cir. 2008). Plaintiff's claims pursuant to 28 U.S.C. § 1962(c) must therefore be dismissed.

To state a RICO conspiracy claim pursuant to 28 U.S.C. § 1962(d), a plaintiff must successfully plead the existence of a substantive RICO violation. See Cofacredit, S.A. v. Windsor Plumbing, 187 F.3d 229, 244-45 (2d Cir. 1999). Thus, because plaintiff has failed to state a claim pursuant to 28 U.S.C. § 1962(c), his claim pursuant to 28 U.S.C. § 1962(d) must also fail.

In his opposition to the motion to dismiss, Peterson cites to a number of cases that, he argues, demonstrate that a

¹ By all accounts, the proceedings were held in full accordance New York's Vehicle and Traffic Law and the Rules and Regulations of the State of New York. See Vehicle and Traffic Law §§ 225 and 228; 15 NYCRR § 124.4. Plaintiff does not claim otherwise; nor does he claim that these regulations themselves violate any state or federal law.

municipal corporation such as the City can be a member of a RICO enterprise and that Officer Watz can be named as a RICO defendant. Regardless of whether the City can be a member of a RICO enterprise and whether Officer Watz can be a RICO defendant, the pleadings do not give rise to a plausible claim that an association-in-fact enterprise does, in fact, exist.

Similarly, the plaintiff relies on Floyd v. The City of New York, 2011 WL 3856515 (S.D.N.Y. 2011), which held that a triable issue of material fact exists as to whether New York Police Department supervisors have a custom or practice of imposing quotas on officers' stop and frisks, summonses, and arrests. Id. at *20. Floyd did not involve alleged RICO violations or the alleged existence of an association-in-fact enterprise, and therefore does not salvage plaintiff's RICO claims.

II. Malicious Prosecution and Abuse of Process

Plaintiff fails to state a claim for malicious prosecution under § 1983 and the Fourth Amendment. To state such a claim, a plaintiff must plead 1) that the defendant initiated a criminal proceeding, 2) that the proceeding was terminated favorably to the plaintiff, 3) that there was no probable cause for the criminal charged, and 4) that the defendant acted maliciously. Savino v. City of New York, 331 F.3d 63, 72 (2d Cir. 2003). Plaintiff has not been the subject of a criminal proceeding that was terminated in his favor.

Likewise, plaintiff's claim for malicious abuse of process fails to meet the pleading standards of Iqbal and Twombly. To state a claim for malicious abuse of process under § 1983 and the Fourth Amendment, a plaintiff must successfully plead that a defendant 1) employed regularly issued legal process to compel performance or forbearance of some act, 2) with intent to do harm without excuse or justification, and 3) in order to obtain a collateral objective that is outside the legitimate ends of the process. Cook v. Sheldon, 41 F.3d 73, 80 (2d Cir. 1994). Plaintiff's factual allegations that he was wrongfully subject to a traffic stop and a conviction for driving while using a cell phone, and that this conviction was wrongfully upheld on appeal, fall well short of stating a plausible claim to relief with respect to these three elements. Plaintiff offers no facts to support the conclusion that the defendants intended to do harm without justification, or that they had some collateral objective outside the legitimate ends of Peterson's traffic summons.

The elements of malicious prosecution and malicious abuse of process are the same under state law as they are under § 1983. Id. Thus, the pleadings on these state law claims are insufficient as well.

III. Procedural Due Process

Plaintiff has not stated a § 1983 claim for violation of

procedural due process. To succeed on a procedural due process claim, a plaintiff must establish (1) a deprivation of life, liberty or property (2) without due process of law. See Logan v. Zimmerman Brush Co., 455 U.S. 422, 428 (1982). In accordance with New York Vehicle and Traffic Law § 225, plaintiff has been afforded a hearing in front of an ALJ at which he could have been represented by a lawyer, an opportunity to cross-examine Officer Watz, an administrative appeal, and an appeal before the Appellate Division that is currently pending. Plaintiff has been afforded an opportunity to be heard "at a meaningful time and in a meaningful manner." Goldberg v. Kelly, 397 U.S. 254, 267 (1970).

IV. Attorney's Fees

Plaintiff's claim for attorney's fees pursuant to 42 U.S.C. § 1988 fails because, although plaintiff is an attorney, he is proceeding pro se and is thus not entitled to attorney's fees. See Kay v. Ehrler, 499 U.S. 432, 437-38 (1991).

V. Fourth Amendment

The sole remaining federal claim is the Fourth Amendment unreasonable search and seizure claim. "[T]he Fourth Amendment requires that an officer making a traffic stop have probable cause or reasonable suspicion that the person stopped has committed a traffic violation or is otherwise engaged in or about to be engaged in criminal activity." United States v.

Harrison, 606 F.3d 42, 45 (2d Cir. 2010) (citation omitted). According to the complaint, there was no legal justification whatsoever for the traffic stop because Peterson was not observed using his cell phone while driving as claimed by Officer Watz. The complaint provides detailed facts in support of this conclusion, including Peterson's cell phone records and his recollections of the traffic stop.

Defendants argue that this claim should be dismissed because a pre-arraignment, non-felony summons requiring a later court appearance does not constitute a seizure under the Fourth Amendment. See Burg v. Collen Gossellin, 591 F.3d 95, 101 (2d Cir. 2010). But Peterson claims that he was issued such a summons and that he was subjected to a traffic stop. His unreasonable seizure claim therefore survives.

VI. Abstention

This litigation will be stayed pending completion of the Article 78 Proceeding. Generally, district courts have a "virtually unflagging obligation to exercise the jurisdiction given them." Royal and Sun Alliance Ins. Co. of Canada v. Century, 466 F.3d 88, 92 (2d Cir. 2006) (citation omitted). Younger v. Harris, 401 U.S. 37 (1971), and its progeny delineate an exception to this rule, requiring federal courts to abstain where appropriate to "allow state courts to resolve pending matters within their jurisdiction." Washington v. County of

Rockland, 373 F.3d 310, 318 (2d Cir. 2004). In Younger, the Supreme Court explained that a federal court, "anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States." Younger, 401 U.S. at 44. Abstention is mandatory when "(1) there is a pending state proceeding, (2) that implicates an important state interest, and (3) the state proceeding affords the federal plaintiff an adequate opportunity for judicial review of his or her federal constitutional claims." Hartford Courant Co. v. Pellegrino, 380 F.3d 83, 100-01 (2d Cir. 2004) (citation omitted). While "Younger was a challenge to an ongoing state criminal case . . . the doctrine has been extended with equal force to federal civil litigation challenging certain other state proceedings." Kaufman v. Kaye, 466 F.3d 83, 86 (2d Cir. 2006). Such state proceedings may include Article 78 proceedings pursuant to the CPRL. See Christ the King regional High School v. Culvert, 815 F.2d 219, 224-25 (2d Cir. 1987).

When the Younger requirements are met, the doctrine mandates dismissal of claims for both injunctive and declaratory relief. See Samuels v. Mackell, 401 U.S. 66, 73 (1971). Dismissal may not be appropriate, however, when the Younger requirements are met in a lawsuit for damages. See Kirschner v. Klemons, 225 F.3d 227, 237-38 (2d Cir. 2000). In such cases, a

district court may stay the federal case pending resolution of the state proceeding. Id. at 238-39.

Peterson's Article 78 petition was transferred to the Appellate Division on January 12, 2011, and Peterson does not challenge defendants' claim that it is currently pending. The Article 78 Proceeding implicates an important state interest, specifically, the safety of the roads and highways. See Dixon v. Love, 431 U.S. 105, 114 (1977). Furthermore, a finding for or against Peterson on the Fourth Amendment unreasonable seizure claim would rest on the very same factual determinations as the Article 78 Proceeding: whether Peterson was using his cell phone before Officer Watz pulled him over. Such a determination by this Court would fail to afford the Appellate Division proper respect for its function as a judicial entity capable of adjudicating federal claims, and call into question the State proceedings. See Pennzoil Co. v. Texaco, Inc., 481 U.S. 1, 10 (1987) (grounding abstention in "the notion of 'comity,' that is, a proper respect for state functions") (citation omitted). Accordingly, the litigation is stayed.

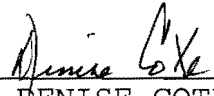
CONCLUSION

The August 15, 2011 motion to dismiss is granted with respect to plaintiff's federal claims for violations of the RICO statute under 18 U.S.C. §§ 1962(c) and (d), for malicious

prosecution and malicious abuse of process under 42 U.S.C. § 1983 and state law, for violation of procedural due process under 42 U.S.C. § 1983, and for attorney's fees pursuant to 42 U.S.C. § 1988. The remainder of the action is stayed pending resolution of plaintiff's Article 78 proceedings.

SO ORDERED:

Dated: New York, New York
January 9, 2012



DENISE COTE
United States District Judge

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